

## 28.1381(A)(3)

### **[Driving/Actual Physical Control] While There Is A Drug In The Defendant's Body**

The crime of [driving/actual physical control] while there is a drug in the defendant's body requires proof that the defendant:

1. [Drove/was in actual physical control of] a vehicle in this state; and
2. Had in [his][her] body [(name of drug)][a metabolite of (name of drug)] at the time of [driving/being in actual physical control of] the vehicle.

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**SOURCE:** A.R.S. § 28-1381(A)(3) (statutory language as of September 1, 2001).

**USE NOTE:** Use language in brackets as appropriate to the facts.

Under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. *See State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest)*, 182 Ariz. 525, 898 P.2d 474 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

If "actual physical control" is an issue, see the definition of that term at Instruction 28.1381(A)(1)-APC.

Insert the name of the particular drug, e.g. "codeine, amphetamine", which is in the body or has been metabolized in the body. The proscribed drugs are any of those found in A.R.S. § 13-3401.

In those cases where a driver ingests a legal substance which through a bodily process unknown to a person of average intelligence and common experience, that substance is transformed into a prohibited substance, the driver is not liable under A.R.S. § 13-1381(A)(3). *State v. Boyd*, 201 Ariz. 27, 31 P.3d 140 (App. 2001).

**COMMENT:** "A person using a drug prescribed by a medical practitioner licensed pursuant to title 32, chapter 7, 11, 13 or 17 is not guilty of violating subsection A, paragraph 3 of this section." A.R.S. § 28-1381(D). The statutory defense applies to only A.R.S. § 28-1381(A)(3).

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